United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7335

To be argued by
George Janow.

United States Court of Appeals

For the Second Circuit.

FRANCES J. MARKHAM and GEORGE W. MARKHAM,

Plaintiffs-Appellants,

against

WILLIAM H. ANDERSON, JR.,

Defendant-Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

Brief of Defendant-Appellee, Dr. William H. Anderson, Jr.

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BRIEF OF DEFENDANT-APPELLEE, DR. WILLIAM H. ANDERSON, JR.

Counterstatement of Issues Presented.

As was suggested by the District Court—the threshhold question presented to this learned Court for determination is whether a physician practicing his profession on the border of two contiguous states, under circumstances akin to those of the defendant-appellee (Dr. Anderson), is engaging in interstate commerce and derives substantial revenue therefrom, within the purview of the statute.

As an incident of such question, there also arises three other questions: (1) is the practice of medicine such as was engaged in by defendant-appellee to be subjected to the same regulation as are "goods" or "commodities" forming a part of "trade" or "commerce" and other commercial activities?; (2) does Section 302 CPLR meet constitutional

requirements and standards?; and (3) was the "tortious act" which caused the accident and the personal injury an act or omission of the defendant-appellee, or the unrelated act or omission or negligence of the vehicle operator or his employer?

Counterstatement of Proceedings Below.

Defendant-appellee, Dr. William H. Anderson, Jr. (hereafter referred to as "Dr. Anderson"), moved the United States District Court for the Western District of New York, Honorable John T. Curtin, Judge, for an order to quash the service of the summons and to dismiss the plaintiffs' complaint on the ground that the court did not acquire jurisdiction of the person of that defendant, Dr. Anderson (7a-8a).*

Such motion was predicated on the basis that the service of the said process on Dr. Anderson, made in his office and home in the Commonwealth of Pennsylvania, by virtue of the long-arm statute of the State of New York—Section 302 (a) (3) (ii) CPLR, did not subject him to the jurisdiction of the United States District Court for the Western District of New York (7a-8a).

The District Judge, after the most careful and exhaustive study and deliberation, dismissed the complaint (83a). In doing so, he wrote an opinion (68a-81a), and, among other statements made by him, said:

> "Viewed in this light, the statute can be said to be directed towards those manufacturers engaged in substantial interstate activity who can expect and who are capable of defending suits in foreign forums and, therefore, Dr. Anderson was not within that class intended to be subject to long arm juris-

*Numerical references in parentheses refer to Appellants' Appendix.

diction. From the facts as outlined above, Dr. Anderson's medical practice is of an essentially local nature and, therefore, he should not be expected or considered capable of defending suits in foreign forums.

"While the instant case is not within an antitrust context, a construction of interstate commerce under Section 302(a)(3)(ii) can be gleaned from the antitrust case law defining that term, which construction would be consistent with the legislative intent of New York's long arm statute. The practice of a profession such as medicine, or law, is predominately a local operation. The fact that a surgeon lives on the border of his state and practices in two cities on either side of that border, does not alter the essentially local nature of his practice. Since the practice of a profession is predominately local in character, interstate commerce under Section 302(a)(3)(ii) should be construed to incorporate the profession-business dichotomy, at least to exclude a local physician who treats his patients in two bordering states. Under the antitrust laws, the practice of medicine has been said to be neither trade nor commerce within Section 1 of the Sherman Antitrust Act" (78a-79a).

Continuing, the Court further ruled:

"In conclusion, then, Dr. Anderson could not be subject to New York's long arm jurisdiction on the basis of Section 302(a)(3)(ii) because his activities as a doctor cannot be considered commerce" (80a).

Pertinent Provisions of Section 302(a)(3)(ii) Civil Practice Law & Rules—New York.

"Sec. 302. Personal jurisdiction by acts of non-domiciliaries.

"(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his

executor or administrator, who in person or through an agent:

"1. * * *

"2. * * *

"3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

* * *

"(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; * * *"

Counterstatement of the Facts.

Defendant-appellee, Dr. Anderson, is a medical doctor and surgeon, and throughout his career has been so engaged, and has had his office for the practice of his profession in West Springfield, Pennsylvania, which has a population of about 500 persons, where he also resides, and, in his words, this community "is almost directly on the border of the States of Ohio and Pennsylvania" (40a).

West Springfield has no hospital or medical institution of its own, in its general area—the nearest hospital to this area in Pennsylvania being in Erie, Pa., a distance of about 25 miles away.

The doctor has been duly licensed to practice medicine and surgery in the Commonwealth of Pennsylvania and the State of Ohio. Although he had been so licensed in and by the State of South Carolina, he does not practice there and has no office in that state.

The only office that he has maintained for his practice has been and is in West Springfield, Pennsylvania, where he also resides. He has no other office anywhere.

Dr. Anderson is a member of the Pennsylvania Medical Society and also of the Erie County Medical Society. He was and is the official school physician of the Northwestern School District of Albion, Pennsylvania, and renders his services at the school, which is about eight miles from his office-home. He receives no compensation for such services. The population of Albion is about 1,800 persons.

Dr. Anderson visits and treats some of his patients in Brown Memorial Hospital which is situated in Conneaut, Ohio,—less than five miles from West Springfield, Pa., and Conneaut has a population of about 14,550 persons. The Brown Memorial Hospital is the nearest hospital to West Springfield and that area generally, the other hospital being in Erie, Pa., a distance of about 25 miles.

In response to an interrogatory by plaintiff (9a) as to how many hours he spends practicing medicine in the State of Ohio, Dr. Anderson stated he averages 14 hours a week, and does so in "making his rounds and surgery at Brown Memorial Hospital from approximately 8:00 A.M. to 10:00 A.M. every day of the week" (39a); and answering interrogatory #17 as to how many patients were referred to him for medical examination, diagnosis or treatment by Ohio physicians or surgeons during the year 1973, Dr. Anderson answered "approximately 4 patients" and that he was one of only two doctors who operate in Brown Memorial Hospital (40a).

Most of the doctor's patients are local residents of Pennsylvania, living in communities and areas adjoining and close by to his office. Also, because of his skill and ability, patients are referred to him by other physicians from

various parts of that state, and in a very few instances, very few patients are recommended to him by doctors from Ohio (40a). His reputation is such that persons living in nearby Albion, Pennsylvania, and also in close by Ohio, seek his attention because of his excellent reputation known to persons generally, as did the Northwestern School District in Albion which made him the official school doctor serving without fee (40a).

Furthermore, residents of small areas in Pennsylvania, and even in Ohio, come to Dr. Anderson in Springfield to receive his medical attention, as they are unable to receive adequate or even any medical, surgical or hospital care and attention in their respective communities because of the paucity of medical practitioners, much the same as such conditions prevail generally in a great number of other rural and small communities.

Those of his patients that need hospitalization of necessity are treated at Brown Memorial Hospital in nearby Conneaut, Ohio, which area adjoins the Pennsylvania boundary, and where they receive Dr. Anderson's care and treatment which hospital he visits every day of the week for two hours—14 hours a week (39a). He sees about five patients there, and their stay is of very short duration, averaging a confinement of about one week (39a-40a).

All of the patients seen or treated by Dr. Anderson in the State of Ohio are seen or treated in Brown Memorial Hospital or in his office in West Springfield, Pennsylvania.

Dr. Anderson testified that he spends approximately 74 hours each week in his practice (39a).

Background of the plaintiffs' cause of Action.

Plaintiffs' claim is for personal injuries, alleged to have been sustained by plaintiff, Frances J. Markham, on Febru-

ary 18, 1972, while she was stationed and employed in a toll booth as a toll collector, on the New York State Thruway, Route 90, Ripley, New York (13a).

Defendant Robert E. Gray, a chauffeur-employee of defendant, Kaplan Trucking Company, was driving a motor vehicle and as he was operating his motor truck through the area of the toll booth at the above location, the side of the vehicle sideswiped the side of such booth and which caused some injury to the above plaintiff, who was inside of such booth (13a) (Federal Highway Adm. Report No. 72-2).

The mishap was investigated by the Federal Highway Administration, and, from its report covering the same (Report No. 72-2), we quote pertinent findings:

> "He (the driver) departed East Chicago, Indiana, at 9:30 p.m. on February 17, 1972, with a load of steel beams and arrived at Madison, Ohio at 4 a.m. February 18, the day of the accident, covering a distance of 370 miles in 6 1/2 hours driving time, averaging 56.9 miles per hour. He slept in the sleeper berth of the truck at Madison, Ohio, until 10 a.m. According to the driver's logs, which were not current at the time of the accident, he left Madison, Ohio at 10 a.m., and traveled a distance of 80 miles to Ripley, New York in 2 hours and 15 minutes, averaging 35.6 miles per hour.
>
> "The driver's logs indicate that he had traveled a distance of 450 miles in 8 hours and 45 minutes, averaging 53 miles per hour when the accident occurred" (p. 9).

In his summary and conclusions, this investigator, without any medical training, rendered the following medical and lay opinion, as appears in his report on page 9:

> "Whether or not the driver had taken his daily insulin in the morning, on the day of the accident

could not definitely be determined. However, the driver admittedly had consumed amphetamines to stay awake during the trip. Amphetamine is a central nervous system stimulant and can cause increases in the rate of metabolism. Whether this holds true for a subject suffering from diabetes is not known. However, the driver's symptoms were compatible with either hyp. r or hypoglycemia since both can result in personality changes and a loss of consciousness. Under any circumstances it would appear that if the driver did take a dose of insulin in the morning of the day of the accident, it did not maintain a normal blood sugar level. This could have been due to excessive fatigue, other health problems, irregular meals and possibly the use of amphetamine."

"While searching the truck, a police officer found a hypodermic syringe, a bottle of insulin inside a thermos bottle and several pills identified as amphetamines. A test of the driver's blood sample for alcohol and drugs taken at the hospital proved negative" (p. 5).

* * *

"The truck driver 56 years of age, was married and a sident of East Springfield, Pennsylvania. He was employed by the motor carrier on October 4, 1958. The driver left the carrier's employ on May 11, 1962, due to a heart attack and at this time his family physician found he was suffering from diabetes. On September 15, 1962, he returned to work. The driver claimed 38 years experience driving commercial vehicles. He had a valid operator's license issued by the State of Pennsylvania" (Report, p. 5).

The driver of the motor vehicle (Gray) had a history of diabetes since 1962 and has been continuously employed to date, but examined and under the care of Dr. Anderson at regular intervals, the last one being had on June 28, 1971, following which Dr. Anderson completed a printed

questionnaire of the Department of Transportation containing a Medical Examiner's Certificate, to which certificates plaintiffs' attorneys refer and discuss (25a, 49a).

In the June 28, 1971 certificate, the doctor stated of his patient Gray, that the latter was "Diabetic on 40 c.c. Lente Insulin," which was not mentioned to the Court by plaintiffs' counsel nor made part of the plaintiffs' Appendix, although it has been marked as Exhibit #19, and another exhibit marked #20 whereon Dr. Anderson stated "Mr. Gray is well regulated on 40 cc Lente Insulin. * * * His urine sugar have been '0' since being regulated."

Wholly unsupported is a statement by plaintiffs' counsel that Gray "required insulin by injection daily." Likewise, contrary to the fact is counsel's statement in his memorandum at page 25a: "However, due to defendant Gray's requirement of insulin by injection, he was not physically qualified to operate motor vehicles in interstate commerce and the requirements of the Federal Motor Carrier Safety Regulations" (see also pp. 49a-50a). And, in the complaint it is alleged, among other things, that "* * * prior to February 18, 1972, * * * defendant William H. Anderson, Jr., a medical doctor, examined defendant Robert E. Gray and wilfully or recklessly or negligently certified that defendant Robert E. Gray was qualified to operate motor vehicles in accordance with Federal Motor Carrier Safety Regulations" (paras. 4, 42-52).

Plaintiffs' counsel nowhere states in their papers and briefs the fact that the Regulations referred to by them were supposed to have first became effective January 1, 1971, and that never before was the subject of diabetes ever discussed or mentioned as a possible disabling disease in such Regulations or the effect it might have upon operators of motor vehicles, or from disqualifying

them from being so engaged. Stated differently, the Regulations in force up to January 1, 1971, had no such drastic and disqualifying provision or made any reference at all to diabetes with reference to motor truck operators.

Nothing was presented to the court indicating that such Regulations were made known to medical practitioners or persons who might be concerned with such new regulations. The court has received no word that Dr. Anderson received notice of such new provision or was advised of the creation of such regulation.

The last examination of Gray was a few months after the above Regulation is said to have become operative, and at that time Dr. Anderson found Gray to be in good physical condition and considered him to be able to continue working as a motor vehicle driver as he had for 38 years previously. As Dr. Anderson placed in his report—"Mr. Gray is well regulated on 40 c.c. Lente Insulin. His urine sugar has been '0' since being regulated." This experienced and capable physician and surgeon reached his medical opinion, which he was qualified to formulate and express, notwithstanding the opinion of a motor vehicle accident investigator. The doctor's opinion was corroborated when reference is had to the Investigation report which states: "A test of the driver's blood sample for alcohol and drugs taken at the hospital proved negative" (p. 5). Plaintiffs' counsel's description of the doctor's opinion and treatment is regrettable indeed.

Gray told the investigator that he had driven the vehicle a distance of 450 miles in eight hours and 45 minutes, averaging 53 miles per hour (p. 8); that "he felt sleepy" (p. 7). The investigator then speculated the opinion that Gray's condition at the time just prior to the

accident "This could have been due to excessive fatigue, other health problems, irregular meals and possibly the use of amphetamine" (p. 9). Be it one or more than one of the above, the cause of the mishap had its origin there, and it was not any "tortious act" of Dr. Anderson's, and not within the meaning of that term as used in the long-arm statute.

We point to the fact that the investigator's report fails to disclose any competent medical opinion indicating that the origin of the cause of the accident might have had its roots in the driver's physical exhaustion from the trip, "excessive fatigue," "irregular meals" with resultant effects therefrom, "possibly the use of amphetamine" or some illness or condition denominated by the investigator as "other health problems." No consideration was given to the foregoing in checking the cause but the easiest thing to do was for counsel to point at Dr. Anderson and make use of the phrase "tortious Act."

POINT I.

Defendant-appellee, a duly licensed physician, practicing in a rural area of Pennsylvania, and serving local residents only, and compensated by them, is not engaged in interstate commerce, and his earnings (revenues) are derived from his local area patients.

Determinative of this appeal, and the basic premise on which this action is predicated, is the answer to the question, whether a medical doctor, practicing his profession locally in an area such as West Springfield, Pennsylvania, with a population of about 500 persons, and which is located, in the words of Dr. Anderson, "almost directly on the border of the States of Ohio and Pennsylvania," becomes engaged in interstate commerce, when

he treats a few Ohio residents as patients in a hospital situate in closeby Ohio and on the border of the two states—the other and nearest hospital in Pennsylvania being 25 miles away?

The District Court answered this question, in these words:

> "From the facts as outlined above, Dr. Anderson's medical practice is of an essentially local nature, and therefore, he should not be expected or considered capable of defending suits in foreign forums" (10).

Continuing, the Court said:

> "* * * nor can Dr. Anderson's actions, which are from the facts inherently of a local nature, be considered interstate activity which would subject Dr. Anderson to New York jurisdiction under Section 302 (a)(3)(ii)."

Such decision is in accord with the views as expressed by the highest authorities, and we subscribe to the same.

The statute referred to is New York's long-arm statute and it treats with grounds whereby jurisdiction of non-domicilaries might be acquired in foreign forums, on such basis as that substantial revenue is derived by non-domiciliaries from interestate or international commerce. Plaintiffs invoke that statute and by means of which they attempt to have Dr. Anderson subjected to the jurisdiction of the United States District Court for Western District of New York, urging that, despite the local nature of his medical practice, he derives revenue from interstate commerce, and is engaged in it.

The Court below held that Dr. Anderson's services and practice are not of an "interstate activity" character, but

is that of a "local nature" and impliedly held that his earnings or revenues are not derived from interstate commerce, so that the court has no jurisdiction over him. A review of applicable legal principles sustain the foregoing decision of the Court.

The Sherman Anti-Trust Act (Title 15 USCA) was enacted into law by the Congress so as to prevent restraints being applied to free competition in business and commercial transactions in connection with production, prices and otherwise control the market to the detriment of purchasers of goods and services to the injury of the public generally. *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 60 S. Ct. 982.

In Sections 1 and 2 of the Act, frequent reference to "trade or commerce among the several states, or with foreign nations" is made so as to embrace all pkases of business and commercial transactions and activities intended to be protected by the Act.

The various courts have construed "trade" as well as "commerce" with definiteness and clarity.

Mr. Justice Story in *The Schooner Nymph,* 18 F. Cas., page 506 (No. 10,388), defined "trade" in this way:

> "In the first place, the word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade.*"

The proscriptions of the Sherman Act were "tailored * * * for the business world," not for the non-commercial aspects of the liberal arts and the learned professions.

> *Marjorie Webster Junior College v. Middle States Association*, 432 F. 2d 650, 654.

In an observation by the Court in *Goldfarb v. Virginia State Bar*, 497 F. 2d 1 (in the U. S. Court of Appeals [4th Cir.], which was reversed on other grounds), it was said: "* * * the practice of a learned profession, medicine, is neither trade nor commerce" (p. 15).

The Court in *United States v. Oregon State Medical Society*, 95 F. Supp. 103 at page 118, said:

> "The practice of medicine as conducted within the State of Oregon by doctors of Oregon, including defendants, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law, 15 U.S.C.A. Sec. 1, nor is it commerce within the meaning of the constitutional grant of power to Congress 'To regulate Commerce * * * among the several States.'"

In *American Medical Association v. United States*, 317 U. S. 519, the Court ruled:

> "The word 'trade' in Section 3 of the Sherman Act does not include the practice of medicine and the rendering of medical services * * * because they are not commercial in nature.
>
> "The natural meaning and judicial definitions of the word 'trade' exclude the professions" (citing cases) (p. 520).

Throughout the development of federal antitrust law there has been judicial recognition of a limited exclusion of "learned professions" from the scope of the anti-trust

laws. This exclusion is not a favor bestowed upon professionals by the courts as a professional courtesy; the exclusion arises from the language of the statutes and the peculiar nature of the services rendered. The courts find nothing to suggest that it should not continue to be applied in appropriate cases. Lower federal courts have continued to recognize and apply this exemption.

As was said in *Goldfarb, supra,* at page 13:

> "The 'learned profession' exemption rests upon two cases decided by the United States Supreme Court. Those cases hold that one engaged in the practice of a profession 'follow(s) a profession and not a trade' (*Federal Trade Comm'n v. Raladam Co.*, 283 U. S. 643, 653, 51 S. Ct. 587, 592), and that such 'personal effort, not related to production, is not a subject of commerce' (*Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U. S. 200, 209, 42 S. Ct. 465, 466). Even when the Supreme Court substantially expanded the scope of the Sherman Act by defining trade in its broadest sense, it recognized that the practice of a 'learned profession' is not a trade." (Citations in parentheses supplied.)

That the defendant-appellee, Dr. Anderson, is a member of a learned profession and is so engaged, cannot be disputed factually, and, to establish the distinction between one engaged in a learned profession and in a trade or commerce, we take leave to quote from the case of *Lincoln Rochester Trust Co. v. Freeman,* 34 N. Y. 2d 1, 7:

> "A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system of discipline of its members for violation of the code of ethics, a duty to subordinate

> financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation."

Included in the long-arm statute discussed above is subdivision 3 (i) which is not pertinent to a consideration of this appeal, but in which subdivision reference is made to "derives substantial revenue from goods used or consumed or services rendered in the state."

In the exercise of caution and full protection of the rights of Dr. Anderson, we wish to further quote from the *Lincoln Rochester* case, *supra,* where the New York Anti-Trust statute (Donnelly Act) was discussed:

> "The view expressed by the then Attorney General indicates that the use of the word 'service' was confined to a commercial or business setting" (p. 7).

Also, we wish to indicate that Dr. Anderson in his answers to plaintiffs' interrogatories gave testimony that his practice of medicine in the State of Ohio was restricted to and in Brown Memorial Hospital with his own patients—never elsewhere in that state.

The fact that some very few of his patients were from Ohio and crossed the border of the two states to see him is of no legal consequence and does not make such practice as an interstate activity. In the case of *Riggall v. Washington County Medical Society,* 249 F. 2d 266, patients from the States of Arkansas, Oklohoma, Kansas, Missouri, Texas and other states, came for medical at-

tentio· to the plaintiff, a medical doctor with offices in Praire Grove, Arkansas, the Court ruled:

> "The mere fact that plaintiff at his locatica in Arkansas may be treating patients from other states who must travel interstate does not result in practicing his profession in interstate commerce as the transportation of such patients is incidental" (268).

Mr. Justice Holmes writing for the Supreme Court of the United States in *Federal Baseball Club v. National League of Professional Baseball Clubs,* 259 U. S. 200 at 209, said:

> "As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place."

We again take leave to refer to the Court of Appeals in the *Goldfarb v. Virginia State Bar,* 497 F. 2d, *supra,* where, at page 16, it was stated:

> "The fact that a service may be utilized by one coincidentally engaged in interstate travel will not establish jurisdiction under the Sherman Act. This is true even where one crosses state lines for the sole purpose of purchasing the service."

In a footnote (number 49) following that declaration appears this remark with a humorous example:

> "The fact that some of plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true every country store that obtains its goods from or serves customers residing outside

the state would be selling in interstate commerce. Uniformly, the courts have held to the contrary."

Elizabeth Hospital v. Richardson, 269 F. 2d 167, 170 (8 Cir.);
Spears Free Clinic & Hospital v. Cleere, 197 F. 2d 125 (10 Cir.).

Where the impact of the disputed trade practice upon interstate commerce is "merely incidental to defendant's local activities" no jurisdiction exists under the Sherman Act.

Kallen v. Nexus Corporation, 353 F. Supp. 33, 36.

See also:

Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F. 2d 341, 343 (9 Cir.);
United States v. Frankfort Distilleries, 324 U. S. 293, 297.

Significantly, we point out the fact that nowhere in their papers or brief do plaintiffs assert that Dr. Anderson has a medical office or is otherwise engaged in the practice of medicine in the State of Ohio, other than in the Brown Memorial Hospital.

Plaintiffs' principal argument is predicated on the fact that defendant, Dr. Anderson, with his medical office and home in West Springfield, Pa., visits Brown Memorial Hospital which is located in Conneaut, Ohio, the immediate vicinity of the doctor's office, that a few of his hospitalized patients come from Ohio and receive post-operative care in his office, and that Brown Memorial Hospital accepts him as a visiting doctor and surgeon.

Mature and realistic consideration given to the situation prevailing in that rural area reveals the fact the communities thereabouts are in great need of medical and

hospital care and attention and are extremely happy at receiving it under the attendant circumstances. Short distances on either side of the state border are meaningless to the local residents, just so they receive the medical attention they require. In that circumstance, they care little, and are concerned less with interstate commerce regulations which do not concern them, when they are unexpectedly afflicted with medical emergencies or serious illnesses—when they can get prompt and devoted attention from Dr. Anderson, who is at hand and works 74 hours every week, in his dedicated efforts to give them his all. His patients are not interested in traveling 25 miles to the nearest other hospital in Erie, Pa., when they are in pain. In the words of Judge Curtin when he referred to Dr. Anderson's practice: It is "inherently of an essentially local nature."

It was held in the case of *United States v. Yellow Cab Co.*, 332 U. S. 218 at page 253, that an activity which is part of a "general local character" is less likely to be subject to the Sherman Act than is an activity which constitutes an "integral part" of interstate commerce. The mere involvement with some facet of interstate commerce has not been deemed sufficient to support jurisdiction under the Sherman Act.

The fact that a service is occasionally utilized to facilitate interstate activities does not subject the one providing that service to the proscriptions of the antitrust acts.

> *Evanston Cab Co. v. Chicago*, 325 F. 2d 907 (7 Cir.)

A consideration of the reported cases dealing with this subject leads to the conclusion that the courts hold that the learned profession exemption is not a personal immunity from prosecution under the antitrust laws, but it

is a recognition that the Sherman Act prohibits only those restraints which are upon trade or commerce—commercial transactions and activities—taking place among the several states or with foreign nations.

It is respectfully submitted to this learned Court that extended argument or the citation of additional cases dealing with the "learned profession" exemption is unnecessary so as to present the well-accepted principle that the practice of medicine is not subject to the provisions of the Sherman Act, for the dual reasons that it is, as a profession, neither trade nor commerce, in interstate commerce or in any other sense; and, secondly, it is exempt from the Act because it is an engagement in a learned profession.

For the reasons mentioned herein, the earnings of Dr. Anderson—or in the words of the section under discussion—Section 302(a)(3)(ii)—"substantial revenue from interstate or international commerce"—are not derived from interstate commerce, but are earned from "an essentially local nature" of medical practice, and which is "predominately a local operation," as was characterized by the court below.

On the basis of the foregoing the order of the court below should be affirmed.

POINT II.

Plaintiffs' use of Section 302(a)(3)(ii) CPLR offends traditional notions of fair play and substantial justice and thereby deprived defendant-appellee of due process.

Shorn of all irrelevancies, it is undisputed that Dr. Anderson did not have any office for the practice of

medicine or surgery or for any other purpose in the State of New York, that he did not reside in New York, that he was not engaged in any activity of any kind in New York. He derived no income or revenue from any source in the State of New York. He had no patients nor rendered any services or treatment of a medical nature to any person in this state.

Dr. Anderson was a resident of and had an office and practiced medicine on Route 20, West Springfield, Pennsylvania. On December 4, 1973, he was served with a summons by a United States Marshal in his office-home at the above location.

His entire time, effort and attention were devoted to the practice of medicine and surgery in his home State of Pennsylvania, except as previously indicated, when he attended at Brown Memorial Hospital. That was the world in which he worked and lived.

Dr. Anderson unexpectedly found himself as a defendant in this lawsuit in the United States District Court for the Western District of New York, situate in Buffalo, New York, at a distance as stated by plaintiffs' counsel of "approximately 110 miles from Dr. Anderson's residence and place of business" and "whatever inconvenience is alleged on the part of Dr. Anderson in defending a suit in an out-of-state forum is actually fictional" (plaintiffs' brief, p. 27). The reasons for those and other statements there made by counsel are unsound and were made under their mistaken impression that they might find some advantage by bringing it before this Court. The question of insurance is irrelevant and this learned Court is not concerned with such matters. Such statements are in poor taste and unwarranted. As a matter of fact, that brings to mind a familiar principle of due process to the effect that the maintenance of a

lawsuit against a non-domiciliary should not offend traditional notions of fair play and substantial justice.

To require Dr. Anderson to travel the distances indicated in each direction on numerous occasions with regard to pre-trial procedures, etc., is burdensome and a serious matter not alone for Dr. Anderson who works 74 hours each week, but more serious and burdensome for his patients who would be deprived of his attention and treatment during such absences.

Normally the instituiton of a lawsuit may be proper and regular, but, in the instance of this action, it is otherwise, and merits criticism and even condemnation. This action is entirely unnecessary and is intended to harass Dr. Anderson and lacks good faith in its institution and prosecution.

Plaintiffs' counsel makes light of the deprivation and hardship visited upon the defendant concerning his defense of the within lawsuit by stating that "whatever inconvenience" he suffers in this litigation would be "fictional." That is a gross understatement of the facts. Dr. Anderson regards this lawsuit as a serious matter, not a "fictional" matter, especially where it involves the attention, effort and waste of his time unnecessarily, in view of the fact which we respectfully call to the attention of this Court.

There is another action now pending in the United States District Court for the Western District of Pennsylvania, by these very plaintiffs, demanding damages for the same alleged injuries, being handled by the same plaintiffs' counsel, and against Dr. Anderson, as a lone defendant. That Court is located in Erie, Pa. The docket number of that case is 74-0011-Erie and bear date January 24, 1974, and served March 8, 1974. The

other defendants in the case before this Court are residents of and available at all times in Pennsylvania for service of process there, but they were not included.

Such treatment accorded to Dr. Anderson proves highly prejudicial, unfair and burdensome to him and persons dependent upon him with regard to their health and incidences thereof. Plaintiffs might say that such uncalled for practices are imposed on the defendant in an attempt to comply with the statute underlying their attempt to litigate with him. We ask: What is the necessity of two identical lawsuits? If the long-arm statute relied upon by plaintiffs affords such treatment, in view of controlling and unquestioned facts, then we submit that it is unmindful of due process of law to which Dr. Anderson is entitled and it is invalid.

Such invalidity of the statute becomes even more apparent, when it appears without contradiction that Dr. Anderson had no professional practice or any activities or contacts of any kind or description whatever within the State of New York, directly or otherwise, by himself or by any agent. Stated in the language of the courts, there is totally lacking even a "minimal contact" by him in this state.

As was said in *International Shoe Co. v. Washington*, 326 U. S. 310:

> "* * * due process requires only that in order to subject a defendant to a judgment *in personam*, to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Melliker v. Meyer*, 311 U. S. 457, 463."

The courts have zealously safeguarded the due process rights of non-domiciliaries in a great number of decisions, and from one of which we quote:

In *Spectacular Promotions v. Radio Station WING,* 272 Fed. Supp. 734, it was expressed in this manner:

> "In determining whether or not a particular situs is a place of injury in the jurisdictional sense, we must be mindful that however 'minimal' the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite of its exercise of power over him." *Hanson v. Denckla,* 357 U. S. 235, 251.

We repeat, for emphasis, that Dr. Anderson was not present in the State of New York, that the process of this Court was served on him in his office--home in the Commonwealth of Pennsylvania, that there has been no proof presented to the Court that he ever had any "minimal contacts" or any contacts of any nature whatever, in New York, and the lawsuit at bar has been and will continue to be burdensome and a hardship on him, his patients and others.

This learned Court had before it the case of *Fontanetta v. American Board of Internal Medicine,* 421 F. 2d 355, where it enunciated the rule of law in this manner, at page 357:

> *"International Shoe Co. v. Washington,* 326 U. S. 310, laid down a new due process test for jurisdiction: Were the contacts with the state sufficient so that allowing a non-domiciliary defendant to be sued there did not 'offend traditional notions of fair play and substantial justice?'" (p. 316).

This Court held in that case that the activities of that defendant did not rise to the level of doing business.

In this case at bar, we urge that Dr. Anderson was a total stranger in, and engaged in no activity of any kind in, the State of New York at any time.

We wish to submit the following from McKinney's Book 7 B, Civil Practice Law and Rules, Practice Commentaries, Joseph M. McLaughlin, C302:19. General, page 97:

> "The most noteworthy feature of subparagrah (3) is that the mere occurrence of a tortious injury in New York still does not suffice as the basis of personal jurisdiction. * * * Under the 1966 amendment, where the defendant never enters New York, but he sets in motion forces which result in injury in this case, there is no jurisdiction over the nonresident unless other contacts, prescribed by the statute, are found."

Assuming *arguendo* that Dr. Anderson set in motion forces which result in injury in this state, which in fact he did not, and since he has not entered New York, does it not follow that the court has not acquired jurisdiction over him, as there were no contacts had by him in the state?

POINT III.

The "tortious act" causing the mishap resulted from events directly imputable to the motor vehicle owner and/or operator, and have no relationship to defendant-appellee or his medical services.

On February 18, 1972, at a toll booth in Ripley, New York, on the New York State Thruway, defendant Robert E. Gray, a motor truck chauffeur, driving his employer's (defendant Kaplan Trucking Company) vehicle,

sideswiped a toll booth as he was passing through its entranceway, resulting in some injury to plaintiff, Frances J. Markham, there employed.

An investigation conducted shortly thereafter by the Federal Highway Administration yields the information that the chauffeur (Gray) had driven the vehicle from East Chicago, Indiana, to the point of accident, 450 miles in eight hours and 45 minutes, that he was tired and "sleepy." The findings of the lay investigator were that "This could have been due to excessive fatigue, other health problems, irregular meals and possibly the use of amphetamine."

Admittedly, Gray had some form of diabetes since 1962, but was under the regular care of Dr. Anderson, who reported in June, 1971, that "Gray is well regulated on 40 c.c. Lente insulin * * * His urine sugar have been 'O' since being regulated."

Gray has uninterruptedly driven a motor truck for 38 years, up to the time of this mishap.

Dr. Anderson filled in the Department form setting forth the facts of Gray's disease, which is dated June 28, 1971, and neither Gray's employer nor the Department found any fault or criticism with Gray's continuance at his employment as a chauffeur of the motor truck, and so he continued.

Neither the Department nor Kaplan, the employer, ever communicated with Dr. Anderson, discussed his opinion and reports with him, nor rejected them, but accepted such reports and continued Gray in his same occupation.

It is plaintiffs' counsel's position that Dr. Anderson in attesting to Gray's physical condition committed a

"tortious act" in his Pennsylvania office and they attempt to hold him as a defendant in this action.

Plaintiffs have failed to present any proof indicating that the accident was proximately and exclusively brought about or had anything to do with Gray's diabetes. There is no credible proof before this Court to establish that Gray's condition on February 18, 1972, was any different than it was since he first was afflicted with diabetes in 1962, during which intervening years he worked steadily and conscientiously without incident. Where is there a casual relation between Dr. Anderson's opinion and report and the mishap more than eight (8) months later? Care must be exercised in not overlooking the many different causes set out in the Report of the Federal investigator. Did the Federal Administrator's office, its staff or Gray's employer take any steps since 1962 to terminate Gray's employment because of his health?

To save the time and patience of this learned Court, we succinctly state, that the mishap occurred because Gray was overworked in driving the vehicle long and many hours, such mileage and in the period of time as stated by him and as evidenced by the truck log. He complained to the investigator that he was "sleepy." His physical condition at the time of the accident, as reported by the investigator, was "due to excessive fatigue, other health problems, irregular meals and possibly the use of amphetamine." What has Dr. Anderson to do with that?

If there be any fault or negligence, it heavily rests on the shoulders of Gray's employer, Kaplan, and/or on Gray,—but it has nothing whatever to do with Dr. Anderson.

The two separate and wholly unrelated events, i. e., the issuance of the doctor's report in June, 1971, and the accident in February, 1972, were so far apart in point of time, in the instrumental cause of the accident, the circumstances and the physical situation, as well as the places where Dr. Anderson issued his report in Pennsylvania, and the mishap taking place in New York, that great care and consideration should be given in establishing the fact that the accident and the cause of action arose only from the improper and negligent operation of the motor vehicle which occurred at or about the toll booth in Ripley, New York, and warrants the dismissal of the lawsuit for lack of jurisdiction of Dr. Anderson.

A case resembling a similar situation was ably decided by this Court in the *Fontanetta* case, 421 F. (2d) 355, *supra*.

See also:

Frummer v. Hilton Hotels, Inc., 19 N. Y. 2d 533, cert. denied 389 U. S. 923.

It is most respectfully submitted that the issuance of the medical report by Dr. Anderson was neither negligent nor improper, but the result of extensive training and knowledge, and was not a tortious act; that such medical reports were never acted upon by the employer or the authorities during the many years of the respective issuance of the many reports which were ignored; and that the intervening period of time between the last report of June, 1971, and the date of accident, causes such remoteness as to erase any connection or link between the two.

It is also urged that nothing has been presented to this Court indicating any relationship between the doctor's report and the accident on February 18, 1972. The issuance of that report has no relevancy to the accident and its cause, and the facts are unrelated to each other and in no way contribute to the occurrence, which resulted from the chauffeur's (Gray) misjudgment or loss of physical endurance.

We respectfully call the attention of this Court to the outstanding fact of this lawsuit. Dr. Anderson's reports and certifications were complete and truthful and stated Gray's medical condition accurately,—and it disclosed that Gray had diabetes and the details thereof, and that it was regulated. He made those statements under oath.

What else could Dr. Anderson have done in the situation? Could he personally have discharged Gray? Obviously not. Dr. Anderson answered the questions asked of him in the certificate in a straightforward and truthful manner and forwarded it to Gray's employer so that the latter would act as he, Kaplan, and the Department, should have acted. It was their neglect or indifference or inattention that made it possible for Gray to continue in his employment. It was their duty to act and possibly dismiss Gray as an employee—Dr. Anderson had no such powers or jurisdiction.

The "tortious act" was not Dr. Anderson's.

Plaintiffs' brief.

The thrust of plaintiffs' argument is that Dr. Anderson's professional practice of medicine, as is the practice in general, "a business," and they refer to it by

such appellation throughout most of their brief. Such contention merits no debate or response.

The cases cited by plaintiffs involve, generally, principles and points of law which are inapposite to the issues involved on this appeal, and stand for general propositions of law and are not authority for a conclusion contrary to that reached by the judge in the district court. Statistics set forth are entirely foreign to the questions presented to this Court.

The facts as they exist in connection with this appeal are real and refer to actualities, and to borrow some language from *Old Colony R. R. Co. v. Commissioner of Internal Revenue*, 284 U. S. 552, at 561, "not some estoeric concept derived from subtle and theoretic analysis" as does plaintiffs' arguments.

POINT IV.

The order of the court below should be affirmed with costs.

Respectfully submitted,

GEORGE I. JANOW,
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